



150 FAYETTEVILLE STREET
SUITE 300
RALEIGH, NC 27601
(919) 715-4000 | WWW.NCLM.ORG

NOVEMBER 14, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 20554

RE: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch,

The NC League of Municipalities (League) appreciates the opportunity to file comments on the Second Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced docket. The League is a membership organization representing over 540 N.C. cities, towns, and villages—nearly all of the incorporated area of North Carolina. The elected and appointed membership of the League strongly opposes the tentative conclusions in the FNPRM that cable-related in-kind contributions are franchise fees. Further, the League membership strongly opposes applying any of these tentative conclusions to state-level franchising systems.

RIGHTS OF WAY RESPONSIBILITIES

N.C. municipal officials have a fundamental, longstanding legal responsibility to ensure that use of public property is made for the benefit and betterment of all members of their communities. With respect to rights of way, numerous N.C. city charters and N.C. Gen. Stat. 160A-296—a general law originally passed over a century ago—confer upon N.C. cities a legal duty to keep public streets and sidewalks in proper repair, open for travel, and free from unnecessary obstructions. Further, decades-old N.C. case law metes out financial penalties for cities that do not adequately perform these responsibilities. Specifically, this case law bars cities from claiming governmental immunity in suits alleging that they did not properly maintain public rights of way or provide open travel. Taking away the defense of governmental immunity in these instances is the judicial system’s way of signaling the heightened responsibility municipal governments have when it comes to safeguarding North Carolina’s rights of way for the public’s benefit.

This policy objective extended to prior state laws that created a local franchise system for cable operators. Fees negotiated as part of those local franchise agreements compensated N.C. cities for their work to ensure that the public’s rights of way were utilized by cable operators in a manner that benefitted the public at large. In-kind contributions, such as donations of PEG channels or the provision of cable service to governmental buildings, served as part of this compensatory system. These contributions, all related

to the provision of cable service, were designed to make the public whole in exchange for cable operators' use of the public's property for their own private enterprises.

NORTH CAROLINA'S STATEWIDE CABLE FRANCHISE SYSTEM

Beginning January 1, 2007, North Carolina switched from a local cable franchise system to the statewide system now in place. As part of that transition, local franchise fees converted to a statewide general sales and use tax that applies specifically to cable operators. The general tax rate imposed on cable operators is seven percent (7%) of gross receipts derived from providing video programming to a N.C. subscriber. N.C. Gen. Stat. 105-164.4(a)(6). In turn, municipalities receive twenty-three and six tenths percent (23.6%) of the net proceeds of the tax. N.C. Gen. Stat. 105-164.44I(a)(2). In 2018, North Carolina cities collectively received \$52.8 million as their share of this state revenue, which continued the policy under the previous local cable franchise system of compensating cities for allowing use of the public's rights of way by private cable enterprises. Further, as explained below, a portion of the remaining seventy-six and three tenths percent (76.3%) of the revenues must be allocated to support local PEG channel operations, if the local government recipient operates one or more PEG channels. N.C. Gen. Stat. 105-164.44I(b).

Also as part of the transition to a statewide franchise, North Carolina preserved the in-kind contribution features of the local franchise system being replaced. To that end, N.C. law now requires cable providers to make PEG channels available to local governments, if the local government follows prescribed statutory procedures. N.C. Gen. Stat. 66-357. At the same time, local governments that provide PEG programming are required to dedicate a portion of their video programming tax revenues to support their local PEG programming operations. N.C. Gen. Stat. 105-164.44I(e). In addition to preserving the funding and availability of PEG channels for the public's benefit, the transition to a statewide cable franchise system also retained a requirement for cable operators to provide in-kind cable service without charge to any public building located within 125 feet of the provider's cable system, upon request by a local government. N.C. Gen. Stat. 66-360. Significant numbers of cities across North Carolina receive this in-kind contribution.

EFFECT OF FNPRM ON NORTH CAROLINA'S STATEWIDE CABLE FRANCHISE SYSTEM

These revenues and in-kind benefits would likely be reduced or eliminated if the proposals in the FNPRM were applied to North Carolina's statewide franchise system, thereby upending North Carolina's longstanding policy of having private cable companies compensate the public for using the public's rights of way. Given the broad definition of "franchise fee" in 47 U.S.C. 542(g)(1), North Carolina's sales and use tax arguably qualifies as a franchise fee. The federal law defines a franchise fee as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." North Carolina's sales and use tax law matches all four elements of this statutory provision. First, it is a tax. Secondly, it is imposed by a franchising authority or other governmental entity; in this case, the State of North Carolina. Third, it is imposed on a cable operator. And finally, the tax is imposed on cable operators solely because of their status as cable operators. If they were not cable operators, they would not pay the sales and use tax. It is unclear whether this revenue would qualify for an exclusion under 47 U.S.C. 542(g)(2).

If North Carolina's video programming tax did not qualify for an exclusion, the revenues N.C. cities now receive would likely be reduced if the FNPRM's proposals took effect. To start, the FNPRM proposes applying the existing cap on local cable franchise fees to statewide franchise fees like North Carolina's. Specifically, this cap limits local cable franchise fees to no more than five percent (5%) of the cable operator's gross revenues attributable to the provision of cable services. Because North Carolina's sales and use tax is calculated at a rate of seven percent (7%) of the cable operator's gross receipts, if this local franchise fee cap were extended to North Carolina's statewide franchise system, N.C. cities could lose

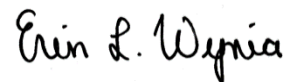
significant sums that they now receive. In FY 2017-18, such a proposal would have meant a minimum \$15 million reduction in revenues to N.C. cities. Due to the risk of a loss of existing revenue to N.C. cities, the League membership strongly opposes application of the current five percent (5%) statutory cap on state-level cable franchise systems such as North Carolina's.

Further, this FNPRM also tentatively concludes that the value of in-kind contributions such as requirements for cable operators to provide a certain number of PEG channels and limited cable service to public buildings should also be included in this five percent cap. The League membership strongly disputes this conclusion.

Two factors drive the League members' opposition. First, because this proposed action would have the effect of reducing the fees paid by cable operators, it would undermine North Carolina's system of requiring compensation by cable operators for their use of the public's property. And second, because North Carolina distributes these revenues to municipalities, such an action would deprive cities of resources used to meet their longstanding legal obligation to maintain rights of way for safe, clear passage by the public. The League membership also holds deep concerns that a cut to this revenue stream would jeopardize cities' ability to support existing PEG programming, a community benefit that would then compete for funding with other property tax-funded services such as transportation and public safety.

The League members appreciate the opportunity to express their opposition to the FNPRM, especially any action to apply its conclusions to state-level cable franchises.

Respectfully submitted,

A handwritten signature in black ink that reads "Erin L. Wynia". The signature is written in a cursive, flowing style.

Erin L. Wynia
Legislative Counsel
NC League of Municipalities
150 Fayetteville Street, Suite 300
Raleigh, NC 27601